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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981-1982

No.

HULLINGHORST INDUSTRIES, INC.,
Petitioner,

versus

DAVID E. CARROLL
AND
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1.

Is a carpenter, who normally works onshore, and who was injured in the process of erecting scaffolding on a pier, covered by the provisions of the Longshoremen's and Harbor Workers' Compensation Act when he takes no part in the loading, unloading, building or repairing of vessels, when he was not assigned to and did not repair or maintain the pier and when neither he nor his employer are engaged in traditional maritime activities?

2.

Is there a separate "employer" test for coverage under the LHWCA in addition to the criteria of "status" and "situs"?

PARTIES TO THE PROCEEDING

All parties to the proceedings from the United States Court of Appeals for the Fifth Circuit, from whose judgment review is sought, are included in the caption of the case before this Court, except BASF-Wyandotte Corporation which was a defendant in the original suit filed in the Eastern District Court for the State of Louisiana, Case No. 75-2467-B and who was dismissed from the suit on December 3, 1975.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Hullinghorst Industries, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit reported at 650 F.2d 750 (5th Cir. 1981) (App. A).

OPINIONS BELOW

(1) This matter was originally heard before Administrative Law Judge Robert S. Amery; his decision rendered on September 27, 1976, Case No. 76-LHCA-652, OWCP No. 7-34955, is unreported (App. B).

(2) The Benefits Review Board reversed the decision of Judge Amery on January 27, 1978 in an opinion reported in 7 BRBS 538, BRB No. 76-500 (App. C).

(3) The petition for review from the Benefits Review Board's decision was dismissed by the Fifth Circuit on April 24, 1978 in an unreported decision, number 78-1532 (App. D).

(4) The decision by Judge Amery on remand was unreported and was rendered on August 20, 1979, Case No. 76-LHCA-652, OWCP No. 7-34955 (App. E).

(5) The decision of the United States Court of Appeals for the Fifth Circuit denying Hullinghorst Industries, Inc.'s petition for a stay of the Administrative Law Judge's Order was unreported and was rendered on September 6, 1979, Case No. 79-3142 (App. F).

(6) The decision of the Benefits Review Board denying Hullinghorst Industries' motion to stay payment was rendered on December 6, 1979 and was unreported, BRB No. 79-558 (App. G).

(7) The January 25, 1980 supplemental order of the Deputy Commissioner of the Seventh Compensation District of the Office of Workers' Compensation Programs is unreported, Case No. 76-LHCA-652, OWCP No. 7-34955, BRB No. 79-558, 76-500 (App. H).

(8) The United States Court of Appeals for the Fifth Circuit's denial of Hullinghorst Industries' motion to stay pending disposition of its petition for review was unreported and was rendered on March 10, 1980, Case No. 80-3116 (App. I).

(9) The final decision of the Benefits Review Board in which the appeal was taken to the Fifth Circuit was rendered on May 20, 1980 and was published in 12 BRBS 401, Docket No. 79-558 (App. J).

JURISDICTION

The judgment of the Court of Appeals (App. A) was entered on July 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the Court of Appeals is based on 33 U.S.C. §921(c), which authorizes an appeal from an order of the Benefit Reviews Board to the United States Court of Appeals.

STATUTES INVOLVED

This case involves a determination of the definition of an "employee" and an "employer" found in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §902(3) and (4):

> "(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

"(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)."

FACTUAL STATEMENT OF THE CASE

Hullinghorst Industries, Inc. is a scaffolding subcontractor engaged to erect and dismantle scaffolding at a plant owned by BASF Wyandotte Corporation adjacent to the Mississippi River. At the plant is a pier extending over the waters of the Mississippi River. Hullinghorst Industries, Inc. neither owns nor leases the pier, the plant, nor the surrounding area. Hullinghorst Industries, Inc. has no employees engaged in the loading, unloading, building or repairing of vessels. Hullinghorst Industries, Inc. is not a stevedoring or a longshoring operation.

David E. Carroll was employed by Hullinghorst Industries, Inc. as a carpenter and his job was to erect and dismantle scaffolding. On the day of his injury he was erecting scaffolding on a pier over the waters of the Mississippi River.

Administrative Judge Robert Amery held the facts surrounding Carroll's activities to be uncontested:

". . . The scaffold was to be used as a place on which workmen could stand in order to repair a turntable which had been damaged by a ship which had accidently bent and torn it when the ship left. The turntable was owned by Wyandotte and was used to load ships in the

river. It was located on the edge of the dock over the water and, when operable, its loading pipe could be swung or swivelled from one hold of a ship to another or from one barge to another. It was located about 200 yards from the levee and there was a metal catwalk from the top of the levee to the turntable.

"The claimant's job and that of his crew was not to repair the turntable or the pier; it was solely to build a scaffold upon which other workers, such as pipefitters or ironworkers, and, perhaps insulators, could stand and do the repair work, then at a later time the claimant and his crew would have the job of tearing this scaffold down. Neither the claimant nor any other employees of Hullinghorst Industries, Inc. were engaged in any way with building, repairing, loading or unloading any vessel . . . .

• • •

"Here, the claimant was not engaged in loading, unloading, repairing or building a vessel, nor was there anything peculiar about his work which would expose him to the same risks as longshoremen who move cargo aboard ship or on the dock. The claimant's work as a carpenter had no realistically significant relationship to traditional maritime activity. It had nothing to do with any vessel or cargo, navigation or commerce." (App. B, Decision of Sept. 27, 1976).

It is uncontested that Carroll's job was not to repair the turntable itself. The workmen who were to repair the turntable were not employed by Hullinghorst Industries. The turntable was not owned by Hullinghorst Industries. Neither Hullinghorst Industries nor any of its employees were engaged in any repair or maintenance work on the pier or on the turntable. Carroll never performed any repair work on the pier, its equipment, or any of its appurtenances.

Administrative Law Judge Amery found that Carroll was not engaged in traditional maritime employment and was therefore not a covered "employee" under the LHWCA (App. B.) The Benefits Review Board ("BRB") reversed the decision of Judge Amery (App. C). The BRB held that Carroll was engaged in "maritime employment" within the definition of the LHWCA because his work was "directly involved" with the process of maintaining equipment used in the loading and unloading process. The BRB remanded the case to Judge Amery for further factual findings.

On remand, Judge Amery, following the holding of the BRB, held Carroll to be a covered "employee" and found that he was permanently and totally disabled (App. E).

Both the Fifth Circuit (App. F & I) and the Benefits Review Board (App. G) denied Hullinghorst Industries' motions to stay compensation and, on appeal, the BRB reaffirmed its previous holding that Carroll was an "employee" under the LHWCA (App. J).

On appeal from the decision of the BRB, the Fifth Circuit held, despite the fact that Carroll was not to repair the turntable, despite the fact that Carroll did not engage in the loading, unloading, building or repairing of any vessel, despite the fact that Carroll was not to perform any maintenance on the turntable, despite the fact that no Hullinghorst employee was to perform any maintenance on the turntable and despite the fact that Hullinghorst Industries had no other employees involved in the loading, unloading, building, repairing any vessels, that Carroll was engaged in maritime employment at the time of his injury. 650 F.2d at 758. (App. A).

Hullinghorst Industries submits that the Court of Appeals' ruling is in direct conflict with the language of the LHWCA in that its rationale deletes any meaningful "status" requirement. Furthermore, the Court's opinion grants no weight at all to the definition of "employer" in the Act, thereby reducing its usage to a mere tautology. The appellate court's expansive holding extends coverage to employees who are beyond the scope of both the express language of the statute and congressional intent.

AMPLIFICATION OF REASONS

In 1972 the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §901 *et seq.*) was amended in many respects. To establish coverage under the Act, as amended, an employee has to meet both a "situs" and a "status" test; he must be in an area over or adjacent to navigable waters ("situs") and he must fit the definition of an employee under the Act ("status").

Since the enactment of the amendments to the LHWCA, this Court has had two opportunities to consider the scope of coverage of the Act in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977); and *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979).

Caputo involved two employees who were engaged in the process of unloading cargo from vessels. Blundo was a checker and Caputo, on the day of his injury, was loading trucks with cargo that had been discharged from ships. This Court found both Blundo and Caputo were covered "employees" because they were in the "situs" area defined by the Act and were engaged in the "essential elements of unloading a vessel." 432

U.S. at 267. This Court noted that the "status" requirement of the LHWCA is an occupational one:

> "The Act focuses primarily on occupations; longshoreman, harborworker, ship repairman, shipbuilder, shipbreaker." 442 U.S. at 273.

This Court emphasized, however, that not everyone in the "situs" area was covered and quoted from the Senate and House Committee Reports on the 1972 amendments, 442 U.S. 432 at 266, footnote 27:

> " 'The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. *The Committee does not intend to cover employees who are loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.* Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged,

> in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." S.Rep. 13: HR Rep. 10-11.' " (Emphasis supplied)

Pfeiffer further expanded on *Caputo* and reemphasized that to determine whether a worker was entitled to benefits under the LHWCA for engaging in "maritime employment" required the application of an occupational test.

Pfeiffer, like *Caputo*, involved two employees. Ford was a warehouseman injured on a public dock while fastening military vehicles, which had been delivered to the port by a ship, onto a railroad flat car. Bryant was a cotton header injured while unloading cotton, which had arrived by a ship, from a dray wagon into a pier warehouse.

This Court held both Ford and Bryant to be "employees" under the LHWCA because they were part of the loading and unloading process and because both men were engaged "in the type of duties that longshoremen perform in transferring goods between ship and land transportation." 444 U.S. at 81.

While noting that the term "maritime employment" was not limited to longshoring operations (444 U.S. at 77, footnote 7), the Court stated:

> "The legislative history discusses workers solely in terms of what they are doing and never in terms of where they are working." 444 U.S. at 80.

The injured worker in this case, Carroll, was not a longshoreman. He was not involved in the process of unloading

vessels, as were the workers in *Caputo*. He was not involved in the process of moving cargo, as were the workers in *Pfeiffer*. He was not even involved in repairing machinery that was to be used in the loading or unloading of a vessel. He was not employed by a stevedoring or longshoring operation. His sole task was to erect and dismantle scaffolding to be used by others.

The Court of Appeals' holding that Carroll was engaged in "maritime employment" eliminates the occupational test of status embodied in the Act. The Court of Appeals concluded that because Carroll's work involved his presence in the "situs" area and because it tangentially involved a pier, he was therefore engaged in "maritime employment."

Under the Court of Appeals' reasoning, coverage would be extended not only to who one, like Carroll, erects scaffolding, but one who merely brings the scaffolding materials out to the pier. It would extend coverage to one who changes a light bulb on a pier. It would extend coverage to one who brought a ladder on to a pier so that another may change a light bulb.

As used by the Court of Appeals, the term "maritime employment" becomes not an occupational test but rather one in which a maritime occupation is deduced from the situs of the injury. It is neither apparent nor logically imperative to conclude that the erection of scaffolding on which others may stand to perform repairs to a turntable is encompassed in the undefined phrase "maritime employment." Indeed, the scaffolding erection process is far more removed from traditional maritime activities than those activities that the House and Senate Committee Reports indicated would

not be subject to coverage, such as employees engaged in further trans-shipment of stored cargo. The process of scaffolding erection cannot be considered "traditionally" maritime in nature. It is not the type of work in which one could expect longshoremen, shipbreakers, or harbor workers to engage.

The Court of Appeals was apparently concerned that any other holding would encourage "the use of 'non-maritime' independent contractors to perform segmented portions of maritime repair projects . . ." 650 F.2d at 758. This fear is groundless. Those employees engaged in "traditional maritime activities" will still be covered in any event, regardless of whether their employer is an independent contractor. For example, a maintenance man who works on shiploading equipment directly and even has occasion to go aboard ships to assist directly in the loading or unloading process would clearly be covered by the Act, as was found in the case of *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30 (1st Cir. 1980), cert. denied ____ U.S. ____, ____ L.Ed. 2d ____, 101 S.Ct. 3080 (1981).

Likewise, an employer could not be able to benefit by dividing his employees into "non-maritime" and "maritime" groups. In *Odom Construction Co. v. United States Department of Labor*, 622 F.2d 110 (5th Cir. 1980), an employee engaged in removing obstructions from a navigable canal was properly held to be engaged in maritime work, even though he was a member of an ostensibly "non-maritime" crew.

Further, if an employee's actions are indisputably maritime in nature at the time of his injury, it should be irrelevant what percentage of his time is spent in non-maritime activities.

Boudloche v. Howard Trucking Co., Inc., 632 F.2d 1346 (5th Cir. 1980).

But if an employee is not engaged in the loading, unloading, building or repairing of a vessel, if his employer is not a stevedoring or longshoring corporation, and if the employee does not have occasion to walk "in and out" of coverage (as would have been the case prior to the 1972 amendments to the Act), to hold that he is nonetheless covered by the LHWCA because his injury occurred on a pier emasculates the "status" test.

If the Court of Appeals' opinion is allowed to stand, the old "water's edge" line (as enunciated in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 [1969]), which employers had attempted to use as a shield, and which line was erased by the 1972 amendments to the Act, will be resurrected as a sword for employees to wield in an attempt to assert coverage under the Act.

Both the Second Circuit and the Fourth Circuits have recognized that all geographic considerations must be eliminated in determining whether an employee meets the "status" test. *Fusco v. Perini North River Associates*, 622 F.2d 1111 (2nd Cir. 1980), on remand from 444 U.S. 1028, 100 S.Ct. 697, 62 L.Ed. 2d 664, held that a worker engaged in the construction of a sewerage plant over navigable waters was not a covered "employee":

> "While the *Ford* case does not deal with construction workers and the opinion does not address itself to the question of whether the 1972 amendments had the effect of depriving any class of workers of benefits it would have enjoyed under the pre-1972 law, we read the opinion

> as precluding any application of the LHWCA, as amended in 1972, to an employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters." 622 F.2d at 1113.

Likewise, in *Conti v. Norfolk and Western Railway Co.*, 566 F.2d 890 (4th Cir. 1977), it was held that railway brakemen were not covered by the LHWCA even though they were injured in a "situs" area while working on coal cars that brought materials to ships. As the Court stated at 566 F.2d 895:

> "It is clear that in the cases before us the occupations of the plaintiffs were not of a traditional maritime nature, but on the contrary were those traditionally associated with railroading. Their tasks and responsibilities with respect to the unloading of the coal from the hopper cars would have been the same at an inland terminal as they were at Lambert's Point, and the sophisticated automation of the facilities at the latter terminal should not obscure the basic fact that the plaintiffs were engaged in unloading a coal train, not a vessel."

To paraphrase *Conti*, Carroll's task of erecting and dismantling scaffolding would have been the same on or off a pier, and the fact that others (not employees of Hullinghorst) were to use the scaffolding to repair a turntable on a pier should not obscure the basic fact that Carroll was engaged in carpentry work, not traditional maritime employment.

It is submitted that the Court of Appeals' holding in this case, while paying lip service to *Caputo* and *Pfeiffer*, actually refuses to recognize the occupational nature of the "status" test by using a criterion so broad that it vitiates any meaning-

ful separate inquiry if the worker is injured over navigable waters.

THE COURT OF APPEALS ALSO ERRONEOUSLY REJECTED THE ARGUMENT THAT THERE IS A SEPARATE INDEPENDENT "EMPLOYER" TEST THAT MUST BE MET UNDER THE ACT

The Court of Appeals held that in 1972 amendments rendered the "employer" status requirement "largely tautological." 650 F.2d at 758 (App. A). This holding is contrary to the express congressional intent behind the 1972 amendments. Both the Senate and House Committee Reports contain the following language:

> "Likewise, the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." Senate Report 92-1125, pg. 13; House Report 92-1441, at pg. 11.

It is clear that, but for the Court of Appeals' holding that Carroll was engaged in "maritime employment," Hullinghorst Industries, Inc. has no other nexus with maritime activities and has no other employees engaged in the loading, unloading, building, or repairing of any vessel.

The retention in the 1972 amendments of the phrase "maritime employment" in the definition of "employer," and

the addition of the phrase "maritime employment" to the definition of "employee" indicates that Congress did not intend to create a definition of "employer" that could be ignored once one had determined that a worker fit the "employee" requirements. Since Hullinghorst Industries is not an "employer" (if one excludes Carroll's scaffolding activities) it is not subject to coverage under the LHWCA.

CONCLUSION

The Court of Appeals' holding that Carroll is an "employee" under the LHWCA is in conflict with this Court's holding in both *Caputo* and *Pfeiffer*. To allow the Court of Appeals' decision to stand would rob the "status" test of any meaning because the appellate court's rationale would allow those who have the most peripheral and attenuated connection with maritime activities to be covered by the LHWCA merely because they were injured in a "situs" area. The Court of Appeals' holding further conflicts with the express congressional intent behind the 1972 amendments to *not* cover "employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity."

This petition for certiorari should be granted.

Respectfullly submitted:

John Dale Powers
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CERTIFICATE

PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

BEFORE ME, the undersigned Notary Public, personally came and appeared John Dale Powers, who, after being duly sworn, did state:

I am a member of the Bar of the Supreme Court of the United States. I certify that on this day I have personally supervised the mailing of 40 copies of this petition for certiorari and that these copies were deposited today in a United States Post Office mail box, with first class postage prepaid and properly addressed to the Clerk of this Court. I further state that this mailing took place within the time permitted by 28 U.S.C. §2101.

I further certify that 3 copies of this petition for certiorari have been sent to each of the following individuals by depositing copies of these documents in a United States Post Office mail box, with first class postage prepaid and properly addressed to the following individuals:

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SWORN TO AND SUBSCRIBED before me this_____ day of October 1981, at Baton Rouge, Louisiana, and before the undersigned competent witnesses.

Original signed by John Dale Powers,
witnessed by Vickie Sanders and
David M. Vaughn and notarized
Michael H. Rubin on October 9, 1981

Notary Public